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In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS SPIEGEL, PETITIONER

v.

TIMOTHY RYAN AND
UNITED STATES DEPARTMENT OF TREASURY,
OFFICE OF THRIFT SUPERVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 1818(c)(1) of Title 12, U.S.C., authorizes the Director of the Office of Thrift Supervision to issue temporary orders requiring restitution to savings and loan associations, based on an administrative record and administrative fact-finding, without advance notice or a formal hearing, but requires the Director to afford a prompt post-deprivation hearing. The issue in this case is whether the Due Process Clause of the Fifth Amendment prohibits issuance of such an order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A23) is reported at 946 F.2d 1435. The opinions of the district court (Pet. App. A24-A42, A43-A62) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1991. The petition for a writ of certiorari was filed on January 9, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the former chief executive officer and chairman of Columbia Savings and Loan Association (Columbia). In November 1989, the Office of Thrift Supervision (OTS) commenced a formal investigation of Columbia's financial affairs to determine whether petitioner had breached his fiduciary duty to Columbia or engaged in unsafe and unsound banking practices. As a result of the investigation, OTS determined that petitioner had taken several improper actions that adversely affected Columbia's financial position. Based on these findings, respondent Timothy Ryan, the Director of OTS (the Director), initiated an administrative enforcement action against petitioner by issuing a "Notice of Charges and Hearing and Notice of Intention to Remove and Prohibit, and to Direct Restitution, and Notice of Assessment of Money Penalty" (Notice of Charges) to petitioner pursuant to 12 U.S.C. 1818(b)(1) (Supp. I 1989). The Notice of Charges provided for an administrative hearing to commence on September 4, 1990. Pet. App. A9-A10, A44-A46.

Because the Director determined that the violations or unsafe or unsound practices specified in the Notice of Charges were likely to cause prejudice to the interests of Columbia or its depositors before the completion of the administrative hearing, the Director also issued a Temporary Order to Cease and Desist (Temporary Order), Pet. App. A63-A71, pursuant to 12 U.S.C. 1818(c)(1) (Supp. I 1989).[1] Among other

[1] Section 1818(c)(1) (Supp. I 1989) authorized OTS to issue temporary orders requiring the individual or entity charged in an administrative proceeding "to cease and desist from [the charged] violation or practice and to take affirmative action to prevent * * * prejudice pending completion of

things, the Temporary Order required petitioner to deposit all Columbia stock held by him into escrow and to establish an escrow account or post security for the return of approximately $19,000,000 he had received from the institution unjustly. Pet. App. A64-A67. The order specifically outlined the violations that were the basis for the restitution order: losses of over $5.7 million the institution incurred on loans the institution made to personal friends of petitioner, *id.* at A65; approximately $450,000 of inappropriate expenses for guns, travel, and other personal items, *id.* at A65-A66; approximately $7.5 million of benefits that had accrued to petitioner from an aircraft, aircraft hangar, and four condominiums the institution maintained for petitioner, *id.* at A66; approximately $2.9 million in excessive compensation petitioner received as a bonus for 1988, *id.* at A67; and approximately $2.4 million dollars in payments made to a charitable foundation from the institution's funds without consent of the board of directors of the institution, *ibid.*

2. Petitioner filed suit in the United States District Court for the Central District of California, seeking to enjoin the order pursuant to 12 U.S.C. 1818(c)(2) (Supp. I 1989), and the district court entered a temporary restraining order on July 6, 1990. In response, OTS filed an action pursuant to 12 U.S.C. 1818(d) (Supp. I 1989), seeking to enforce

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[the administrative] proceedings." Section 1818(b)(6)(A) (Supp. I 1989) provided: "The authority to issue an order under * * * subsection (c) of this section * * * includes the authority to require [the charged party to] make restitution or provide reimbursement, indemnification, or guarantee against [such] loss." As discussed below, these provisions subsequently have been modified to clarify OTS's authority in this area.

the Temporary Order. On August 6, 1990, the court granted petitioner's motion and enjoined OTS from enforcing the order. Pet. App. A43-A62.[2] First, the court held that the Temporary Order exceeded OTS's authority because Section 1818(c)(1) included only authority to "prevent" matters harmful to the institution, not authority to "correct" them. Pet. App. A48-A49. The district court also rejected OTS's reliance on the authority granted in Section 1818(b)(6)(A) to require restitution, noting that Section 1818(c)(1) states that orders issued under the Section can include the relief authorized by Section 1818(b)(6)(B); in the court's view, the express authorization to include the remedies set forth in subsection (B) of Section 1818(b)(6) implicitly excluded the authority to include the remedies set forth in subsection (A) of Section 1818(b)(6). Pet. App. A54-A55. The court went on to note its view that a contrary conclusion would violate the Due Process Clause of the Fifth Amendment, because the statute would authorize a seizure without either an advance hearing or judicial review to determine independently whether the seizure is warranted. Pet. App. A61.

3. The court of appeals reversed. Pet. App. A6-A23. First, the court concluded that Section 1818(c)(1) authorized the remedy contained in the Temporary Order. The court noted that Section 1818(c)(1) "on its face" authorized OTS to issue temporary cease-and-desist orders requiring "affirmative action to prevent . . . dissipation [of an institution's assets] or prejudice [to its depositors]," Pet. App.

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[2] The district court issued an initial opinion on the date it granted petitioner's motion, Pet. App. A24-A42, but revised the opinion in minor respects on October 4, 1990. The text refers to the October 4th version of the opinion.

A12 (bracketed insertions by court of appeals), and that "common sense" supported the conclusion that restitution by petitioner would prevent the further dissipation of Columbia's assets and harm to its depositors. *Ibid.* The court also noted that Section 1818(b)(6) explicitly authorized OTS to issue Section 1818(c)(1) orders requiring an individual to take "affirmative action to correct" violations, including requirements that the individual "make restitution," Section 1818(b)(6)(A). Pet. App. A12.

The court of appeals also rejected petitioner's contention that the Due Process Clause requires a pre-deprivation hearing in this context. Pet. App. A15-A22. The court analyzed the case under the three-part test first articulated in *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972), which permits postponing notice and opportunity for a hearing until after the deprivation when there is "an important governmental or general public interest[,] * * * a special need for very prompt action," and a determination by a government official "under the standards of a narrowly drawn statute, that [the seizure] was necessary and justified in the particular instance." Like the district court, the court of appeals agreed that the temporary order served an important governmental interest—fighting insider abuses and maintaining the integrity of the Nation's depository institutions—and that there was a need for prompt action to avoid the risk of further dissipation or secretion of assets of the institution. Pet. App. A16-A17; see *id.* at A58-A59. The court of appeals did not agree, however, with the district court's conclusion that the Temporary Order did not provide for "substantial assurance that the deprivation is not baseless or unwarranted." *Id.* at A17 (quoting *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988)). In the court of appeals' view, this require-

ment was met "by a combination of factors," including the facts that OTS was required to satisfy specific statutory requirements before issuing the order, that the order was issued by an expert agency, and that the decision was supported by detailed findings of petitioner's misconduct. Pet. App. A18. With respect to petitioner's contention that *Mallen*'s "substantial assurance" requirement could be met only by an independent determination as to the merits, the court explained that the analysis in *Mallen* did not turn on the existence of any independent verification of the agency's action, and noted that *Fuentes* "made no reference to an external check" in its initial articulation of the test at issue. Pet. App. A19. It also noted that this Court's decisions repeatedly had upheld such deprivations, in various circumstances, "without any suggestion of a requirement of an independent check." *Ibid.*[3]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals. Moreover, because the statute subsequently has been amended to clarify the agency's authority to issue orders like the one at issue in this case, this petition does not present an appropriate vehicle to resolve the constitutional question that it raises.

1. As this Court recognized in *Fuentes* v. *Shevin*, there are certain situations in which "this Court [has] allowed outright seizure without opportunity for a prior hearing." 407 U.S. at 91. Petitioner ac-

[3] Judge Rymer (joined by Judge Hall) concurred, noting her opinion that the statutory scheme provided adequate opportunity for judicial review. Pet. App. A22-A23.

knowledges that the three-part test outlined in *Fuentes* applies to this case, see Pet. 16-17, and does not contend that the seizure fails the first part of the test, because it furthers an important governmental or general public interest. Hence the only issue is whether the court of appeals correctly determined that Section 1818(c)(1) meets the second and third parts of the test.

a. Both of the lower courts concluded that there was in fact a need for prompt action in this case. Petitioner briefly suggests (Pet. 17) that this is not the case, relying on the fact that the agency had been investigating him for some time before it entered the order. But this suggestion is meritless, as the court of appeals recognized, because "the gravity of the charges against [petitioner]" strongly supported the agency's view that prompt action was necessary "to avoid the risk that [petitioner] would dissipate his assets or attempt to put them beyond the government's reach." Pet. App. A17. The simple truth is that, once the agency discovered the true extent of petitioner's wrongdoing, it was entirely reasonable to act promptly to ensure that funds would remain available to compensate the institution for losses that otherwise would have to be borne by the agency's insurance funds.[4] Petitioner's challenge to this conclusion essentially raises a factual question unsuitable for review in this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

b. Nor is there any merit to petitioner's challenge (Pet. 17-21) to the court of appeals' conclusion that

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[4] Petitioner's reliance (Pet. 17) on *United States* v. *Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265 (2d Cir. 1989), is misplaced. That case involved a personal residence, an asset uniquely unsuitable to being "readily moved or dissipated." *Ibid.*

the statutory framework provided an adequate assurance of accuracy before the seizure. Petitioner notes that a grand jury had indicted Mallen before the FDIC took the action this Court upheld in *Mallen*, and argues that *Mallen* therefore established a requirement that the pre-seizure determination be made by "an independent person or entity that was functionally equivalent to the grand jury indictment in *Mallen*." Pet. 19. We disagree. Nothing in *Mallen* suggests that the determination be made in any particular way; *Mallen* simply states that the grand jury indictment involved there was one clearly adequate way to ensure accuracy. See *Mallen*, 486 U.S. at 241. *Fuentes* itself suggests that it is satisfactory for the entity authorizing the seizure to make the finding itself. See *Fuentes*, 407 U.S. at 91 (requiring that "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance"). Thus, the detailed findings that were the result of OTS's lengthy investigation, which are described in the Temporary Order, Pet. App. A63-A67, provide the necessary "assurance that the deprivation is not baseless or unwarranted." *Mallen*, 486 U.S. at 240.

2. Moreover, aside from the merits of petitioner's argument, the issue raised by the petition does not warrant review by this Court. The decision of the court of appeals is the first appellate decision squarely to address a due process challenge to an order entered under Section 1818(c)(1). Compare *Paul* v. *Ryan*, 948 F.2d 1297 (11th Cir. 1991) (Table) (per curiam order without opinion), aff'g *Paul* v. *Office of Thrift Supervision*, 763 F. Supp. 568, 571-573 (S.D. Fla. 1990) (rejecting due process

challenge to Section 1818(c)(1) order requiring former institution officer to post security for amounts allegedly owed to institution); see also *Parker* v. *Ryan*, 760 F. Supp. 1189, 1192-1193 (N.D. Miss. 1991) (same), appeal pending, No. 91-1405 (5th Cir.).

Moreover, because Congress has amended Section 1818(c)(1) to make it clear that OTS has the authority to issue orders like the order at issue in this case, we believe this case presents a poor vehicle to resolve the constitutional question. Section 2596 of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4908, specifically removed both of the bases relied upon by the district court in ruling that the statute did not grant OTS the authority to issue the order in this case.[5] Although we agree with

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[5] As discussed above, the district court's determination that Section 1818(c)(1) did not authorize the order issued in this case rested in part on the fact that the 1989 version of Section 1818(c)(1) explicitly authorizes orders only to "prevent" harm, not to correct or remedy it. See Pet. App. A48-A49. Section 2596(b)(1) of the Crime Control Act resolved this potential problem by adding the phrase "or remedy" to 12 U.S.C. 1818(c)(1), making it clear that orders issued under 12 U.S.C. 1818(c)(1) now can not only "prevent" harm, but also "remedy" it. 104 Stat. 4908. The district court also relied on the cross-reference in the 1989 version of Section 1818(c)(1)—which expressly authorized OTS to issue orders including requirements specified in Section 1818(b)(6)(B)—to support the inference that Section 1818(c)(1) did not authorize orders including requirements specified in Section 1818(b)(6)(A). See Pet. App. A54. Section 2596(b)(2) of the Crime Control Act, 104 Stat. 4908, removed this source of possible doubt by altering the cross-reference in 12 U.S.C. 1818(c)(1) from "1818(b)(6)(B)" to "1818(b)(6)." Even petitioner concedes that there is "no doubt" that the 1990 amendments grant OTS the authority to issue orders of the type involved in this case. See Pet. 9.

the court of appeals that even the pre-1990 version of Section 1818(c)(1) authorized this type of order, the constitutional quesion would be presented more squarely in a case arising under the revised statute, with respect to which there can be no substantial doubt as to the agency's statutory authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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